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No. 579

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

INTERSTATE COMMERCE COMMISSION, *et al.*, *Appellants*

v.

JAMES McWILLIAMS BLUE LINE, INC., *et al.*, *Appellees*

On Appeal from the United States District Court
for the Southern District of New York

MEMORANDUM FOR APPELLANTS IN OPPOSITION TO THE MOTION TO AFFIRM

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MEMORANDUM FOR APPELLANTS IN OPPOSITION TO THE MOTION TO AFFIRM

Pursuant to Rule 7, Paragraph 3, of the Rules of the Supreme Court, appellants file this statement opposing the motion to affirm filed by James McWilliams Blue Line, Inc., and certain other appellees, on January 23, 1952.

Appellants note that the United States has not filed a motion to affirm and thus does not deny that the questions presented by the appeal are substantial. Of course, the United States concedes nothing as to the merits. The

basic reasons why appellants believe the questions presented are substantial and of public importance are set forth in their statement as to jurisdiction and will not be repeated here. While appellees' argument in support of their motion to affirm actually emphasizes the public importance and substantial nature of the question involved and demonstrates the necessity of this Court's noting probable jurisdiction and setting the cause down for argument, appellants feel that a short reply is required to put the issues back in proper focus.

I

Contrary to appellees' contentions, the substantial questions presented by this appeal are not foreclosed by the decision in the Mechling case.

Appellees' extensive arguments based upon *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, ignore the real issue and basis for the decision in that case. In *Mechling*, the Commission was faced with the problem of carrying out conflicting Congressional policies. The barge lines involved were admittedly "connecting lines" and entitled to the protection of Section 3(4) of the Interstate Commerce Act,[1] which provides that carriers "shall not discriminate in their rates, fares and charges between connecting lines." On the other hand, Section 307(d) of the Act gives the Commission the power, in the case of a through route, where one of the

[1] For convenience the pertinent provisions of Sections 2, 3(4), 15a, 307(d), and the Declaration of National Transportation Policy are set forth in the appendix hereto.

carriers is a common carrier by water, to "prescribe such reasonable differentials as it may find to be justified" between all-rail and rail-water routes. The Commission construed its power under Section 307(d) to justify a different treatment of connecting water lines *vis-a-vis* connecting rail lines, despite the provisions of Section 3(4). This Court reversed and in effect held that "reasonable differentials" in Section 307(d), when read in the light of the Declaration of National Transportation Policy, meant "cost differentials."

No such conflicting policies are involved here. The Commission did not purport to prescribe or approve the assailed rates under Section 307(d) and the district court in reaching its decision held it unnecessary to decide whether the Blue Line is a "connecting line" within the meaning of Section 3(4). Therefore, however this case may superficially resemble *Mechling*, the fundamental reasons which led this Court to hold unlawful the rates there involved are not present.

The rates which the district court found to be unlawful in this case are necessary to carry out the policy of the Act, which requires the Commission to preserve an adequate system of transportation by rail, and the mandate of Section 15a, which directs the Commission, in prescribing just and reasonable rates, to take into account the revenue needs of the railroads. Our position is:

First, no question of competing Congressional policies is involved here. James McWilliams Blue Line's trans-

portation of commodities from New Haven to Hartford and other points in New England is wholly unregulated by the Commission. Such unregulated transportation is not a "mode of transportation" subject to the provisions of the Act and is not covered by the Declaration of National Transportation Policy. This is clear, because it is impossible for the Commission to carry out such a policy with respect to transportation which it is powerless to regulate, and the Congress cannot reasonably have intended to impose an impossible burden upon the Commission.

This view is also supported by the legislative history of the Transportation Act of 1940 (54 Stat. 898). The bill as originally introduced[2] provided for "fair and impartial regulation of all modes of transportation." Apparently realizing that this was too broad, the Senate Committee on Interstate Commerce amended this provision to include only modes of transportation "subject to the provisions" of the Act. Moreover, during the debate on the bill, this colloquy occurred between Senator Shipstead and Senator Wheeler, the Committee Chairman who was in charge of the measure in the Senate:

> Senator Shipstead:
> "* * * But at the same time the bill contains no provision for regulating the private water carriers and other private carriers."

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[2]S. 2009, 76th Cong., 1st Sess.

Senator Wheeler:
"We are not regulating the bulk carriers either. *So the bill does not affect them.*"[3] (Italics ours.)

Second, even if this Court, by extending *Mechling*, holds that unregulated bulk transportation by barge is covered by the Declaration of National Transportation Policy, then this Court will face the problem of resolving conflicts in Congressional policy which were not involved in *Mechling*. Certainly this question would be substantial, because if the Commission, in proceedings involving general increases in railroad rates, must consider the incidental effect of such increases on unregulated transportation and in substance allow unregulated barges and other forms of transportation to participate in railroad rate increases, the mandate of Section 15a of the Act will be impossible of fulfillment.

The district court failed to look beyond the facade of *Mechling* to the foundation upon which that case rested. Consequently, in construing and applying Section 2, the court failed to consider or give weight to the Declaration of National Transportation Policy. Its decision is based on the premise that regardless of the practical necessity of the Commission's prescribing the assailed rates in order to preserve an adequate system of transportation by rail and regardless of whether unregulated barge transportation is within the coverage of the Declaration of Policy, Section 2 lays down an inflexible standard which condemns the assailed rates. It is this interpre-

[3] 84 Cong. Rec. 5877.

tation of Section 2 which has the far-reaching consequences summarized in our jurisdictional statement and which raises questions for decision by this Court which are both substantial and of public importance.

II

There is no merit in appellees' contention that even apart from Mechling the decided opinions of this Court require a finding that the Commission exceeded its statutory authority in holding that the assailed rates do not violate Section 2.

The district court relied upon *Mechling* only for the purpose of supporting its construction of Section 2. It also relied upon certain other cases decided prior to the enactment of the Transportation Act of 1940. These cases involve decisions of this Court upholding findings by the Commission of violations of Section 2. Thus, in *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, 220 U. S. 235, this Court upheld the finding by the Commission that Section 2 condemned the railroads' practice of charging freight forwarders a higher carload rate than ordinary shippers. In *Wight* v. *United States*, 167 U. S. 512, the Commission held and this Court agreed that it was a violation of Section 2 to give an off-line shipper an allowance for cartage while withholding it from other shippers. These cases involve obvious discriminations against shippers located in the same communities, whereby one shipper was deprived of a service or rate which was available to another shipper. In this case the assailed rates are available to all equally and

there is no unjust discrimination here in fact or in law against any appellee.

Appellees' argument is largely based upon the following quotation from *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co.*, *supra*, where this Court said that Section 90 of the English Railway Clauses Consolidation Act of 1845, from which Section 2 was substantially taken:

> "* * * did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated." (220 U. S. at 253.)

Appellees rely upon this quotation to support their statement:

> "For it has long been well settled that the provision in Section 2 regarding, 'substantially similar circumstances and conditions' has reference *only to the circumstances and conditions of the transportation itself the rates for which are in issue.*" (Italics ours.)

If this is correct, it is difficult to see how any proportional rates could be established, and certainly it would follow that a railroad could have only one proportional rate to or from any one point, regardless of how or how far a shipment moves beyond, because the service performed by the railroad must necessarily be the same, irrespective of what happens to the shipment while it is off the railroad's line.

But neither *Interstate Commerce Commission* v. *Delaware, L. & W. R. Co., supra*, nor *Wight* v. *United States, supra*, nor any other decision of this Court has been considered by the Commission or this Court to outlaw proportional rates, which are lower than local rates, or more than one proportional rate to or from the same point, which vary according to length of the through movement. Indeed, railroads by long-established custom have normally charged rates which are relatively lower mile for mile for long hauls than those for shorter hauls, and this practice has not been confined to hauls which are wholly by rail; it has been extended to hauls which are partly by rail and partly by other forms of transportation. As illustrative of this wide-spread practice, a number of examples of cases where railroads maintain several proportional rates to the same point, the application of which depends upon where shipments move beyond, are given in our statement as to jurisdiction.

There is nothing in *Mechling* which condemns this practice. *Mechling* actually involved four proportional or reshipping rates to the East from Chicago. Three of the rates applied only to all-rail shipments. One applied to grain originating in Illinois. Another applied to grain originating in the Northwest. A third, and lowest of the proportional rates, applied to grain originating west of the Mississippi River. The fourth proportional rate applied to grain originating in Illinois and moving to Chicago by barge. In *Mechling* this Court did not hold that barged grain had to be given the same proportional

rates as grain originating in the Northwest or west of the Mississippi. It held only that the eastern railroads had to give grain moving into Chicago via connecting barge lines the benefit of the same proportional rates that applied to grain moving into Chicago by connecting railroads from the same origins in Illinois.

As a matter of fact, the decided opinions of this Court are contrary to appellees' contentions. As long ago as 1896 this Court held that prior and subsequent transportation may be considered where proportional rates are challenged as violating Section 2. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197. And more recently this Court, in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U. S. 671, reaffirmed the validity of proportional rates, which differ from and are lower than corresponding local rates for the same transportation.

III

The decision below is contrary to the Barringer case.

In *Barringer & Co.* v. *United States*, 319 U. S. 1, cotton was typically collected at ginning points and shipped to compress points by rail. At the compress points the cotton was assembled in carload quantities for shipment to destination. A charge of 5½¢ per square bale was made by the railroads for loading at the compress point. This loading charge was not included in the line-haul rates but was published in the tariffs as a separate charge. It was assessable and collectible by the railroads at the time the loading service was performed, regardless of

where the loaded car moved afterwards. Nevertheless, if the car moved to points on the Gulf of Mexico, the railroads refunded the loading charges, but they made no such refund if the loaded car moved to other destinations in the Southeast.

This Court in *Barringer* stated explicitly that "It is undoubted that the loading service here involved is a transportation service to which §2 applies." 319 U. S. 1, 6. Thus, appellees' argument that the provision in Section 2 regarding "substantially similar circumstances and conditions" refers only to "circumstances and conditions of the transportation itself the rates of which are in issue" would mean that neither the Commission nor this Court, in determining whether there was a violation of Section 2, could look beyond or through the loading service which was covered by a separately-published rate to consider what happened to the cars after they were loaded. But in *Barringer* this Court did precisely that.

A comparison of the application of the rates involved in *Barringer* with those involved here may be helpful. In *Barringer*, if two cars were loaded with cotton on the same sidetrack at the same time, the railroad performed similar, or even identical, services in loading the cars and assessed the same charges which were separately published in its tariffs. Here a Pocahontas line might move two carloads of coal from the mine to Hampton Roads for transshipment beyond and collect the same charges for that service. In *Barringer*, if one of the cars subsequently moved by rail to the Gulf of Mexico, under

another separately-published provision in the railroads' tariffs the loading charge would be refunded. The loading charge would not be refunded if the other car moved to some other destination by rail, or even to the same destination partly by rail and partly by truck. Here, if one of the carloads of coal moved by a Pocahontas line to Hampton Roads, subsequently moving from a New England port to an interior destination in New England by rail, a part of the transportation charges would be refunded to the shipper to prevent the collection of an overcharge. If the other carload of coal moved to Europe or some other destination or did not move from a New England port to an interior destination in New England by rail, no such refund would be made, because there would have been no overcharge. In *Barringer* this Court held that there was no violation of Section 2. The same result is required in this case.[4]

In *Barringer* the Commission and this Court looked beyond or through a particular transportation service and the charges applicable to such service to additional transportation by rail. That is precisely what the Commission and the railroads have done here. They have looked beyond or through the service performed by the Pocahontas lines in moving coal to Hampton Roads to regulated transportation furnished by the railroads in New England, in order to divide rate increases au-

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[4]No question of Section 3(4) was involved in *Barringer*. While appellees invoked that section before the court below, the court did not pass on that issue and its decision rests solely on Section 2. Thus, appellees' argument based on Section 3(4) is irrelevant at this stage and should not obscure the controlling importance of *Barringer* on the Section 2 issue.

thorized by the Commission. The district court's failure to do so is in direct contravention of the decision of this Court in *Barringer*.

IV

Contrary to appellees' contention, none of appellees has standing to invoke Section 2.

In attempting to answer appellants' argument that none of the appellees has standing to invoke Section 2, appellees make two points:

First, that in *Mechling* this Court on the appeal of Mechling, a water carrier and not a shipper, held that Section 2 of the Act was violated. Our answer is that in *Mechling* Section 2 was only incidentally involved and the question of whether any of the parties was entitled to invoke Section 2 was not raised. That question is raised here.

Second, that "it is well-settled that a decision that rates are discriminatory in violation of Section 2 is not dependent upon proof and a finding of injury to the shippers concerned." This we deny, for unless there is injury to a shipper there can be no justiciable controversy, and neither the district court nor this Court has jurisdiction to set aside the Commission's order. Moreover, without proof of injury there can be no unjust discrimination.[5] It is true that a shipper need not show

[5] In *Mechling*, on brief, the United States and the Secretary of Agriculture conceded: "Plainly, a difference in rates can be discriminatory only where it produces injury and, where it produces injury, the different treatment can be justified only by showing that a greater burden is sustained in transporting the traffic charged the higher rate.

"* * * Injury to connecting carriers from the difference in proportional rates herein prescribed could occur only where the inbound water and rail lines compete for traffic." (Pages 68-9)

that he is in competition with another shipper in order to establish a violation of Section 2, but he must point to another shipper in the same locality who is given rates which are not available to him. None of the appellees has pointed to any such shipper.

Appellees ignore our further argument in support of our position that none of the appellees has the standing to invoke Section 2. We contend that only shippers can invoke Section 2. *Barringer & Co.* v. *United States*, 319 U. S. 1, *Williams* v. *Terminal Co.*, 315 U. S. 386. Appellees do not deny this. The only shippers involved in this case are T. A. D. Jones & Co., Inc., and Wyatt, Inc., both of whom own tidewater docks at New Haven. Each of these shippers has access to rail-ocean-rail and rail-ocean-barge proportional rates. Neither has an advantage over the other in this respect.

The important fact, however, is that neither Jones nor Wyatt, so far as the record shows, has ever shipped coal via rail from New Haven to any purchaser who can receive coal via barge. Appellees claim that the assailed rates "subsidize" the New Haven Railroad in competing with the Blue Line for the movement of coal from New Haven to interior destinations in New England. Even if this were so, the record shows that in no case has this alleged "subsidy" been sufficient to take one pound of coal off the barges and put it on the rails. Appellees do not deny this.

We submit, therefore, that as to points which can be served either by barge or by rail the rail-ocean-rail

proportionals are simply "paper" rates. Such paper rates cannot result in unjust discrimination, because they do not in fact injure any shippers or the Blue Line. Thus, the evidence supports the Commission's finding that there are no parties to this action who are subject to unjust discrimination, and the district court's action in setting aside the Commission's order under Section 2 is erroneous.

CONCLUSION

For the reasons set forth in the statement as to jurisdiction and this memorandum, we submit that the questions presented in this appeal are substantial and of public importance. These questions cannot be properly disposed of on an examination of the appeal papers. Probable jurisdiction should be noted and the cause set down for argument.

Respectfully submitted,

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February, 1952.

APPENDIX

The pertinent provisions of the Interstate Commerce Act are as follows:

Section 2 of Part I of the Interstate Commerce Act:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2)

Section 3(4) of Part I of the Interstate Commerce Act:

> All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not spe-

cifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III. (49 U. S. C. 3[4])

Section 15a of Part I of the Interstate Commerce Act:

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (49 U. S. C. 15a)

Section 307(d) of Part III of the Interstate Commerce Act:

The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without a complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by common carriers by water, or by such carriers and carriers

by railroad, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. In the case of a through route, where one of the carriers is a common carrier by water, the Commission shall prescribe such reasonable differentials as it may find to be justified between all-rail rates and the joint rates in connection with such common carrier by water. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and common carriers by water. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancellation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of section 15. (49 U. S. C. 907(d))

The Declaration of National Transportation Policy:

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions

in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Section 1, Act of September 18, 1940, c. 722, 54 Stat. 898, 899; 49 U. S. C., notes preceding Sections 1, 301 and 901.)